SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

W. E. FLOYD, et al,

Petitioners.

vs.

J. T. EGGLESTON, et al.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below

The opinion of the Court of Civil Appeals of Texas for the 8th Supreme Judicial District of Texas at El Paso is reported at 137 S.W. 2nd 182. Writ of error was denied by the Supreme Court of Texas January 3, 1940. (See appendix of this petition).

II.

Jurisdiction

1. The statutory provision in Judicial Code, Section 237-B as amended by the Acts February 13, 1925, 28 U.S. C.A. Section 344 (B) page 206.

2. The date of the judgment of the Court of Civil Appeals of Texas at El Paso is October 12, 1939. Writ of

error was denied by the Supreme Court of Texas on January 3, 1940. Mr. Justice William O. Douglas by appropriate order extended the time for filing this petition for a period of sixty days from March 30, 1940.

3. The nature of the case brings this proceeding within the jurisdictional provisions of Section 237-B, supra. Claim of Federal constitutional right was raised in the original trial in the One Hundred and Twenty-Fourth District Court of Gregg County, Texas. A denial of due process in violation of the 14th Amendment to the Constitution of the United States is inherent in the case though not specifically pleaded.

Your petitioners claim that the entire proceedings in this case are unconstitutional in denying to them due process of law under the 14th Amendment. This claim is grounded upon the contention that your petitioners, by reason of a bribed jury in the original cause and the subsequent refusal of the judiciary of the State of Texas to allow them to prove such bribery, have been denied their Constitutional right to their day in court and have been deprived of their property without due process of law.

4. The following cases, among others, sustain the jurisdiction:

Tumey v. Ohio, 273, U.S. 510, 523;
Ex parte Baer (*D.C.E.D. Ky.*) 20 Fed. 2nd 912;
Truax v. Corrigan, 257 U.S. 312, 332.

III.

Statement of the Case

On March 19, 1932, after a trial by a jury bribed by the Continental State Bank of Big Sandy, Texas, a judgment was rendered in cause number 7709 in the District Court of Gregg County, Texas for the 124th Judicial District in favor of the said Continental State Bank of Big Sandy and against your petitioners. Your petitioners did not know of this bribery until the 21st day of April, 1938. The case was appealed to the Court of Civil Appeals of Texas at Texarkana. The opinion of that court is styled *Pepper, et al v. Continental State Bank of Big Sandy* and appears in 60 S.W. 2nd at page 1089. That court reversed and rendered a judgment in favor of parties other than your petitioners. A writ of error was sued out to the Supreme Court of Texas, which reversed the judgment of the Court of Civil Appeals and affirmed the judgment of the lower court, 106 S.W. 2nd 654. An examination of the decision will reveal that it is founded upon findings of fact by the jury.

Thereafter, several bills of review were filed by your petitioners in the District Court of Gregg County, Texas and other courts seeking to set aside the judgment in the original case on the grounds of perjury and intimidation of witnesses. As a result of these several bills of review an original proceeding was instituted in the Supreme Court of Texas by the Continental State Bank of Big Sandy and others against your petitioners, seeking a writ of prohibition to prevent your petitioners from further proceeding with their several bills of review. The writ of prohibition was granted by the Supreme Court of Texas (114 S.W. 2nd 530) restraining your petitioners from further proceeding with those specific bills of review and

"from further interference with or hindrance of the judgment of this court entered on January 16, 1937 in Continental State Bank of Big Sandy, et al v. Pepper, et al, 106 S.W. 2nd 654."

The writ of prohibition was issued on March 23, 1938. On April 7, 1938 your petitioners filed a motion for rehearing. The motion was overruled on April 27, 1938. On April 21, 1938, one week before the motion for rehearing was overruled, your petitioners discovered that in the original trial two of the jurors trying said case had been bribed by the Continental State Bank of Big Sandy, Texas.

On June 23, 1938 your petitioners filed a new bill of review in the One Hundred and Twenty-fourth District Court of Gregg County, Texas to set aside the judgment rendered on the verdict of the bribed jury. Your petitioners alleged and stood ready to prove the bribery of the two jurors by the Continental State Bank of Big Sandy or its agents. (R. p___)

The Continental State Bank of Big Sandy and the Amerada Petroleum Corporation, which holds through said Bank, filed a motion to dismiss said cause, setting up as ground therefor, that the prosecution and trial would be in direct conflict and disobedience of the aforesaid writ of prohibition and that your petitioners had been guilty of laches in not presenting their charges of bribery earlier. (R. p___) The trial court sustained the motion holding that the bill of review was in conflict with the writ of prohibition but declining to hold that your petitioners had been guilty of any laches in setting up the charges of bribery as grounds for setting aside the aforesaid judgment. (R. p. ____). Your petitioners appealed to the Court of Civil Appeals at Texarkana, Texas and the

case was transferred to the Court of Civil Appeals at El Paso, which court affirmed the judgment of the trial court, (137 S.W.(2nd) 182). The court held that:

> "An injunctive writ issued by the Supreme Court, not void, must be obeyed according to its terms until and unless modified or vacated by that court."

The court further held that your petitioners had failed to prosecute their bill of review with diligence inasmuch as the bribery was discovered one week before your petitioners' motion for rehearing in the prohibition case was overruled, and that the charges of bribery should have been presented in that case. (R. p....)

The original suit deprived your petitioners of an oil and gas lease on land situated in the heart of the East Texas oil district, of a present potential value in excess of six million dollars. Your petitioners have never had a trial or an opportunity to present their contentions to a fair and impartial tribunal.

IV.

Errors Assigned

1. That the courts of the State of Texas deprived your petitioners of the protection of the due-process clause of the 14th Amendment to the Constitution of the United States by denying to them their day in court and by depriving them of their property without any judicial determination of their rights whatsoever.

Argument

Your petitioners present this, their petition for a writ of certiorari, with a conscious assurance that justice will not be forever denied them. That to condemn without a hearing violates the due-process clause of the 14th Amendment needs nothing but statement. Your petitioners believe that the proceedings in this matter from the original suit to the present time, founded as they all are upon the verdict of a bribed jury, are void and without effect legally or morally.

This Court, speaking through Mr. Chief Justice Taft, in the case of *Truax v. Corrigan*, (257 U.S. 312 at 332) said:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado v. California*, 110 U.S. 516, 535."

Mr. Chief Justice Taft again, in *Tumey v. Ohio*, 273 U.S. 510 at 523, in speaking of a trial by a prejudiced judge said:

> "But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."

If it can be said that a trial by a judge who has a pecuniary interest in a case is a denial of due process, then ***a fortiori*** a trial by a bribed jury, which renders a verdict in

favor of the party who bribed it, is a denial of those fundamental principles of right and justice which constitute the foundation on which our judicial system is built.

These decisions of this court have been followed in *Ex parte Baer* (*D.C.E.D. Ky.*) 25 Fed. (2nd) 912.

Judge Cooley in his excellent work entitled *Cooley's Constitutional Limitations, Eighth Edition, Volume Two,* page 870 expresses the rule thus:

> "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord *Coke* has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturae sunt immutabilia,* and they are *leges legum.*'"

The bribery of a jury makes a party to litigation the judge of his own cause. Your petitioners were originally denied their day in court by reason of said bribery and they have now been informed by the Courts of Texas that the road to the recovery of their property is forever barred. And by such ruling the Courts of the State of Texas have sanctioned and approved the iniquitous method by which the Continental State Bank of Big Sandy prevailed in this litigation.

No man can say with reason that such a judgment should be allowed to stand. An expression of the broad general principle is found in 16 C. J. S. pages 1272-73 with cases there cited:

> "Due process of law is essential to a valid judgment; and a judgment is void for want of due process where the court * * * renders a judgment * * * without any

judicial determination of the facts which alone can support it."

It is universally held that a judgment may be set aside for fraud. This Court, in the case of *United States v. Throckmorton,* 98 U.S. 61 at 65, speaking through Mr. Justice Miller said:

> "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Wells, Res Adjudicata, sect. 499; *Pearce v. Olney,* 20 Conn. 544; *Wierich v. De Zoya,* 7 Ill. 385; *Kent v. Ricards,* 3 Md. Ch. 392; *Smith v. Lowry,* 1 Johns. (N. Y.) Ch. 320; *DeLouis et al v. Meek et al.,* 2 Iowa, 55.
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> "In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

The courts of Texas have not heretofore ignored this fundamental principle of law. In *Wagley v. Wagley* 230 S.W. 493 at 495, the Court of Civil Appeals said this:

> "The rule is well established that judgment may be set aside by a direct suit brought for that purpose, upon a proper showing of fraud, accident or mistake."

The Court of Civil Appeals again held in *Elder v. Byrd Frost, Inc.*, 110 S.W. (2nd) 172 at 174:

> "It is not to be understood that a trial court is without jurisdiction to entertain a petition or suit, in the nature of a bill of review, based upon sufficient grounds of fraud, accident or mistake, to vacate a judgment rendered at a former term of its court, and relitigate the subject matter, even though the judgment has on appeal been affirmed and thus made the judgment of the appellate court. Accordingly the defendants in the bill of review are not entitled as a matter of law or right to prohibit prosecution of such bill nor will the appellate court issue the writ, except where it is shown that the alleged grounds upon which the bill of review is based are not sufficient to authorize vacation of the judgment attacked. On the other hand, the judgment is res adjudicata of the subsequent suit or bill of review seeking to relitigate the same subject matter, when the grounds alleged are insufficient to authorize vacation of the judgment attacked. Determination of the sufficiency of the alleged grounds upon which the bill of review is based involves consideration of the particular circumstances of the case in which the judgment attacked was rendered. We shall now examine the alleged grounds upon which the bill of review in cause No. 11290-B is based.
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> "(6, 7) The first ground alleged is that Trip Elder, plaintiff in cause No. 416-B gave a juror $200.00 to either hang the jury in Elder's favor or to by the exercise of the juror's influence upon the other members

of the jury obtain a verdict for Elder. There is no question but that bribery of a juror is fraud sufficient to set aside the verdict of the jury, and to vacate the judgment dependent upon that verdict. But, as shown from the opinion of this court, 92 S.W. 2nd 1134, the judgment here sought to be vacated is not dependent upon the verdict of the jury. It is based upon defendants' failure to establish their only defense, namely, that the deed conveying the land to plaintiff was intended as a mortgage. Elder being entitled to judgment upon the facts as a matter of law, the fraud alleged against him and the juror, if true, would not taint nor impair the judgment rendered, therefore would not constitute a ground for vacating the judgment."

In this case the Continental State Bank of Big Sandy was not entitled to a judgment as a matter of law. On the contrary, the Commission of Appeals of Texas, whose opinion was adopted by the Supreme Court of Texas (114 S.W. (2nd) pages 530-533), specifically based its opinion upholding the judgment upon the findings of the jury. The court said:

"The principal issue in the case was as to the validity of a trustee's sale of the land made April 3, 1928, to Continental State Bank of Big Sandy at a time when the title, subject to the lien, was in Pepper and wife. Two attacks, among others, made by Pepper and wife, and those holding under them, upon the title of Continental State Bank as purchaser at the trustee's sale were: First, that the sale was invalid for failure to comply with certain formalities; and second, that the bank prior to the trustee's sale agreed with Pepper and wife that the sale was to be made, not for the purpose of divesting title, but solely to satisfy a bank examiner with respect to the note, and that thereafter Pepper and wife should retain the land or reacquire title by continuing to make payments to the bank of the amounts

due on the note. *The jury in answer to special issues found that it was not agreed that the sale would be a mere formality for the purpose of satisfying a bank examiner, and that it was agreed that Pepper might reacquire the land by payment of the amount of money due the bank. It further found that Pepper did not make the payments to the bank and that after the trustee's sale he moved off the land and abandoned the intention of making the payments.* The trial court's judgment sustained the validity of the trustee's sale and the bank's unqualified ownership of the land thereunder. That judgment, as has been said, was affirmed by this court. (Emphasis supplied).

"Secondary issues arose out of a controversy between Eggleston, Joines, Anderson and Kaufman, on the one hand, and Floyd and Winans, on the other, as to the ownership under Pepper and wife of the oil, gas, and other mineral rights in the land. Eggleston and his associates claimed under an oil and gas lease and a mineral deed executed by Pepper and wife on March 16 and March 27, 1931. Floyd and Winans claimed under written contract executed August 4, 1931, by which Pepper and wife agreed to lease the land to them for oil and gas and to transfer to them an undivided one-half interest in the oil, gas, and other minerals. Allegations were made that Eggleston perpetrated a fraud upon Pepper in procuring the execution of the oil and gas lease and mineral deed under which he, Joines, Anderson and Kaufman, claimed, and that Floyd and Winans by means of fraudulent representations induced Pepper and wife to execute the contract in their favor for the mineral rights. *The jury's verdict on these secondary issues was favorable to Eggleston and his associates and unfavorable to Floyd and Winans."* (Emphasis supplied).

It is elementary that the scope of a writ of prohibition does not extend beyond the record on which the writ of prohibition is based. The court of Civil Appeals of Texas held,

however, that your petitioners were guilty of laches or negligence in not presenting to the Supreme Court of Texas in the prohibition case the matter of the bribery which was discovered approximately one month after the writ of prohibition had been issued and approximately one week before your petitioners' motion for rehearing in that case was overruled. The expression of the rule is found in 50 C. J. page 662 as follows:

> "In order that a writ of prohibition may issue, there must be some matter actually pending upon which action is threatened; an application prior thereto is premature, *and the writ cannot be used to prevent the institution of an action or prosecution.*" (Emphasis supplied).

That a court will not extend a writ of prohibition to matters outside of the record before it is amply demonstrated in a decision of this Court in *United States v. Hoffman,* 4 Wallace, 158, as follows:

> "The suggestion that there are or may be other cases against the relator of the same character can have no legal force in this case. If they are now pending, and the relator will satisfy the court that they are proper cases for the exercise of the court's authority, it would probably issue writs instead of a rule, but a writ in this case could not restrain the judge in the other cases by its own force, and could affect his action only so far as he might respect the principle on which the court acted in this case. We are not prepared to adopt the rule that we will issue a writ in a case where its issue is not justified, for the sole purpose of establishing a principle to govern other cases."

The Supreme Court of Texas could not consider matters which could not be placed before it under the ac-

cepted principles of law. See 50 C. J. 710 and cases cited, where it is said:

> "For the purpose of determining whether the inferior tribunal has jurisdiction, the court may look to the allegations contained in the motion or petition in the proceeding below, which are presumed to be true, and to the evidence before the inferior court, but it cannot consider issues of fact dehors the record, raised in the superior court by the petition, answer, and accompanying affidavits."

Is it to be wondered at that your petitioners did not present the new matter of the bribery just discovered and attempt to inject it into a record already before the court and upon which a writ of prohibition had already been granted? That writ of prohibition was directed at and restrained the prosecution of your petitioners' bills of review which were then pending. It cannot have any application to a subsequent bill of review setting up different grounds without depriving your petitioners of their Constitutional right to be heard.

In conclusion, your petitioners realize that in the proceedings in the Texas court they have never referred in so many words to the manifest injustice being done them as a denial of "due process". Their protestations, however, against such manifest injustice are part and parcel of the entire proceeding. Perhaps the most vehement protest made by your petitioners is found in their application for rehearing in the Court of Civil Appeals where they said, in referring to the present bill of review:

> "It is not an interference with or hindrance of, but is and seeks the annihilation of said judgment and is and seeks to declare said judgment absolutely void on account of the fraud practiced and

perpetrated by Appellees in obtaining said judgment by bribery of the jurors who tried the case, thus undermining the very ground sill of judicial justice in this Government and fundamental fairness between man and man and the establishment of eternal justice in the courts of our State."

The question of whether or not a Federal question has been properly raised in a State court is in itself a Federal question, to be decided by this Court and this Court alone. That principle of law has been held by this Court in the following cases, among others: *Lovell v. Griffin,* 303 U.S. 444; *Schuylkill Trust Company v. Pennsylvania,* 296 U.S. 113, 121; *Ward v. Love County,* 253, U.S. 17, 22; *Carter v. Texas,* 177 U.S. 442, 447; *Covington and Lexington Turnpike Company v. Sandford,* 164 U.S. 578, 595; *Boyd v. Thayer,* 143 U.S. 135, 180; *Neal v. Delaware,* 103 U.S. 370, 396, 397.

This entire proceeding goes to the heart of the principle of "Due Process." Your petitioners could not have failed to raise the question without abandoning their suit altogether.

Conclusion

Your petitioners submit that the actions of the Texas Courts in taking away their property without their having ever had an opportunity to a fair and impartial trial violates the due process clause of the Fourteenth Amendment to the Constitution of the United States. The relief prayed for should be granted and the decision of the Court of Civil Appeals of Texas at El Paso reversed.

Respectfully submitted,

CRAMPTON HARRIS,
Counsel for Petitioners.